No. 76-446

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NORTHEAST MARINE TERMINAL COMPANY, INCORPORATED and STATE INSURANCE FUND, PETITIONERS

v.

RALPH CAPUTO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is not yet reported. The opinion of the Benefits Review Board (Pet. App. 47a-50a) is reported at 3 BRBS 13.[1] The administrative law judge's decision (Pet. App. 51a-55a) is not reported; a synopsis of it appears at 2 BRBS 4 (ALJ).

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a-58a) was entered on July 1, 1976. A petition for

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[1]The Benefits Review Board Service, published by Matthew Bender & Company, is the reporter of the Board's decisions.

rehearing was denied on September 3, 1976 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act provides compensation to a longshoreman injured on land while loading cargo, previously discharged from a ship, into a truck for overland carriage.

STATUTES INVOLVED

1. Prior to its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 2(3), 44 Stat. 1425, 33 U.S.C. 902(3):

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 44 Stat. 1426, 33 U.S.C. 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 *et seq.*, the Act now provides in relevant part:

Section 2(3), 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 86 Stat. 1251, 33 U.S.C. (Supp. V) 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, repairing, or building a vessel).

STATEMENT

Ralph Caputo was a longshoreman usually employed by Pittston Stevedoring Corporation to do a variety of tasks on the waterfront (Pet. App. 11a). When Pittston had no work available, Caputo sought similar employment with other maritime employers through the Waterfront Commission hiring hall. On April 16, 1973, he was sent to petitioner Northeast Marine Terminal Company's 39th Street Pier to work as "terminal labor" (Pet. App. 48a). He was assigned by Northeast to load a consignee's truck with cargo that had been discharged from a ship at least five days before (*ibid.*). While using a dolly to move cargo inside the truck, he fell and injured his foot (*ibid.*).

Petitioners resisted Caputo's claim for compensation, arguing that his injury was not within the coverage of the Act because he was not engaged in maritime employment at the time of the injury. The administrative law judge awarded Caputo compensation, relying on the Benefits Review Board's decision in *Avvento* v. *Hellenic Lines, Inc.*, 1 BRBS 174.

Avvento held that an employee injured while loading cargo into a consignee's truck was covered by the Act. The Board reasoned that the employee was engaged in maritime employment because he was performing the last of a series of operations necessary to transfer the ship's cargo from its hold to the land carrier; the employee therefore met the "status" test established by Section 2(3) of the Act. The Board also concluded that the employee met the "situs" test of Section 3(a) because the injury occurred in a terminal customarily used to unload a vessel and transfer possession of its cargo. Concluding that *Avvento* controlled the instant case, the Board affirmed the administrative law judge's decision (Pet. App. 48a). The Board declined petitioners' invitation to hold that the claimant's employment had lost its maritime character because the cargo had been transferred from the vessel to the terminal five days before Caputo loaded it into the consignee's truck (*id.* at 48a-49a).

A divided panel of the court of appeals upheld the Board's decision.[2] The court did not endorse the Board's

[2]The panel questioned whether the Director, Office of Workers' Compensation Programs, the federal respondent here, was a proper party in the court of appeals. Pet. App. 12a-14a n. 5. It concluded that some federal participation was proper, however, and therefore did not reach the question whether the Benefits Review Board itself should have been substituted for the Director. Petitioners did not seek substitution in the court of appeals and have not presented in their petition any question concerning the identity of the proper federal party. The question therefore is not before the Court in this case.

approach, however; it thought that the Act covers claimants engaged in the handling of cargo up to the point at which the consignee receives delivery and begins to transport the cargo from the pier, but it added the *caveat* that this would be so if "the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel" (Pet. App. 42). The court thought that the record was less than clear on several questions concerning the structure of waterfront activities and the tasks of waterfront workers, but it found it unnecessary to remand the case to the Board.[3]

DISCUSSION

The courts of appeals are in serious conflict concerning the extent of shore-side coverage under the 1972 amendments to the Act. The Benefits Review Board has concluded that the coverage extends to any person engaged in taking cargo off a vessel, transferring it to a terminal or pier, working with it in the terminal, and transferring it to land transportation or the consignee's possession. The Fifth Circuit has endorsed the Board's position in this regard.[4] *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 543-544. The Fourth Circuit, on the other hand, has held that the coverage of the Act ends once the cargo has been removed from the vessel and from its container. *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F. 2d 1080, adhered to

[3]Compare Pet. App. 22a-24a and n. 13 with Pet. 3-4.

[4]So have respected scholars. See Gilmore and Black, *The Law of Admiralty* 423-430 (2d ed. 1975). Gilmore and Black, however, would discard any "status" test and make the "situs" test dispositive, thus providing coverage even more extensive than the Board's position allows.

en banc, No. 75-1051, decided August 26, 1976.[5] The Fourth Circuit therefore would have denied recovery to Caputo.

The court of appeals in this case took an intermediate position, awarding compensation for an injury after the first point of rest, but apparently requiring Caputo to establish not only that he was engaged in transferring cargo from the terminal to a land carrier but also that he spent a significant part of his time loading or unloading vessels. The First Circuit has indicated that it is inclined to agree with the decision in the instant case. *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F. 2d 264, 272-277, petition for a writ of certiorari pending, No. 76-571. The Third Circuit has not yet addressed the precise problem presented here, but in dealing with a related problem it endorsed the views of Judge Craven, who dissented in the *I.T.O.* case and supported the Board's position. *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, No. 76-2039, decided August 5, 1976, slip op. 16-18.[6]

This conflict among the circuits is undesirable. It has created uncertainty, and uncertainty has led to a flood of litigation. Thirty-seven cases involving the question presented here are now pending before the Benefits Review Board, and 20 more are pending in the courts of appeals. In 1975 approximately 160,000 injuries were reported by employers under the Act, and the Department of Labor informs us that more than half of those

[5]Three judges believe that coverage ends when the cargo reaches its first point of rest after leaving the vessel; two judges endorse the Board's position; a sixth judge believes that coverage extends to activity (such as "stripping" containers) within the terminal after unloading, but no farther.

[6]But cf. *id.* at slip op. 8.

injuries occurred on land. In the same year nearly $80 million was paid under the Act in compensation and medical benefits. The Act is designed to be self-administering in most cases, but this has become impossible in light of the prevailing uncertainties concerning the extent of the Act's coverage. We therefore believe that the Court should resolve the conflict among the circuits as expeditiously as possible.

This is an excellent case for such resolution. Caputo was engaged in loading cargo into a consignee's truck, and, under the Board's rule, this is the last step of the transfer process that is covered by the Act. If Caputo is covered then other employees who work with the cargo in the terminal building itself[7] are covered *a fortiori*. If the Court should hold that Caputo is not covered, the Court's rationale presumably would indicate the appropriate disposition of other cases involving activities more proximate to the loading and unloading of the vessel. Moreover, although the court of appeals thought that the record in this case was not complete (Pet. App. 22a-24a), that did not deter it from disposing of the case in its present posture. If this Court should hold, contrary to our submission, that additional "legislative" evidence of the sort envisaged by the court of appeals should be taken, it could remand the case to the Board for that purpose. Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326; *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, No. 75-1097, decided May 24, 1976.

[7]Such as "stuffers" and "strippers." See *International Terminal Operating Co., Inc.* v. *Blundo*, petition for a writ of certiorari pending, No. 76-454, which was consolidated by the Second Circuit with the instant case and decided in the same opinion. *Stockman* also involves activity within the terminal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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